In the Court of Appeals of the State of Alaska

Belinda D. Nelson, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals Nos. **A-13008/ A-13014** **Order** Petition for Rehearing Date of Order: **July 7, 2022**

Trial Court Case No. **1KE-17-00024CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

The State of Alaska seeks rehearing of our decision in *Nelson v. State*, __ P.3d __, Op. No. 2721, 2022 WL 499586 (Alaska App. Feb. 18, 2022). In *Nelson*, we held that the district court applied an insufficiently favorable presumption regarding Nelson's blood alcohol content in response to the violation of her due process right to an independent chemical test, and we remanded for a new trial. In its petition, the State does not challenge our substantive ruling but instead takes issue with our chosen remedy. In particular, the State argues that, because Nelson was convicted following a bench trial, the appropriate remedy is a remand for reconsideration of the evidence by the same judge who presided over the original trial.

Although the State did not propose this remedy in its original briefing, the State now argues that we should grant its petition for rehearing because, in its view, we failed to consider a controlling decision and overlooked or misconceived a material proposition of law.[1] The State relies on our prior decision in *Colgan v. State* for the proposition that, when the trial court applies the law incorrectly during a bench trial, a

[1] *See* Alaska R. App. P. 506(a)(1)-(2).

new trial is unnecessary because application of the correct legal standard can be achieved through reconsideration.[2]

But *Colgan* does not stand for such a broad proposition. In *Colgan*, we concluded only that, where the trial judge after a bench trial failed to expressly state whether he had found the specific intent required for criminal liability under the relevant statute, any ambiguity could be rectified "by simply remanding this case to the superior court for reconsideration of the verdicts of conviction in light [of the proper legal standard]."[3] *Colgan* is therefore a case-specific application of the discretion afforded this Court under Alaska Appellate Rule 520.

Under Appellate Rule 520, when an appellate court modifies, vacates, sets aside, or reverses a judgment, it "may . . . require such further proceedings to be had as may be just under the circumstances." By directing the court to achieve what is "just under the circumstances," this rule necessarily vests discretion for determining the appropriate remedy with the reviewing court.[4]

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[2] *Colgan v. State*, 711 P.2d 533 (Alaska App. 1985).

[3] *Id.* at 536; *see also Ambrose v. State*, 1995 WL 17220777 (Alaska App. Apr. 26, 1995) (unpublished) (remanding after bench trial for clarification of a similar ambiguity in the trial judge's findings). In *Ambrose*, it was unclear whether the judge had properly allocated the burden of proof with respect to the defendant's claim of self-defense, and we stated: "While it might be possible to choose one of these interpretations [of the trial judge's findings] as more plausible than the other, [the judge]'s remarks are sufficiently ambiguous, in our view, to preclude making such a choice with certainty." *Id.* at *2.

[4] *See, e.g.*, *State v. Jones*, 193 P.3d 457, 460 (Idaho App. 2008) (recognizing, based on a similar rule of appellate procedure, that "the decision remains within the discretion of the appellate court as to what remedial procedure is appropriate upon remand"). *Cf. Booth*

(continued...)

In *Colgan*, we concluded that it was just, under the specific circumstances of that case, to allow the trial judge to clarify his findings and reconsider his verdict without holding a new trial. But we did not hold that this was the *only* just remedy, nor did we hold that a new trial would be unjust in all cases where the trial court incorrectly applied the law during a bench trial.

Instead, as the cases cited by the parties in their pleadings on this petition demonstrate, the decision whether to remand for reconsideration or for a new trial is a discretionary one that depends on the specific circumstances of a case.[5] Particularly when the parties might introduce new evidence to meet the correct legal standard, or where credibility determinations are central to the case, ordering a new trial — rather than remanding for reconsideration — may be an appropriate remedy.[6]

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[4] (...continued)
v. State, 251 P.3d 369, 373 (Alaska App. 2011) (explaining that the "abuse of discretion" standard of review applies "where (a) the law does not specify a particular 'right' answer or response to the situation, but instead only specifies the factors or criteria that a judge should consider, and (b) reasonable judges, given the same facts and applying the correct criteria, might come to differing conclusions about how to deal with the problem").

[5] *Compare Colgan*, 711 P.2d at 536 (concluding that, because the trial judge made no express finding whether defendant acted with requisite specific intent, a remand for reconsideration was appropriate remedy to clarify findings and determine whether error was prejudicial), *with State v. Massey*, 278 P.3d 130, 133 (Or. App. 2012) (observing, in remanding for a new trial after trial court relied on an improper instruction during a bench trial: "That the state adduced legally sufficient evidence to support the same outcome under the correct legal theory is immaterial.").

[6] *See, e.g.*, *United States v. Livingston*, 459 F.2d 797, 798 (3d Cir. 1972) (en banc) (recognizing that there might be cases tried to the court in which credibility issues are so
(continued...)

Prior to issuing our opinion in this case, we considered the question of the appropriate remedy. We concluded that, under the circumstances, a new trial was appropriate. Particularly in the absence of any briefing or contrary argument by the State, this decision was a reasonable one.

As one court has written, a limited remand can demand a lot from a trial court:

> [A] trial court that [is] required to reconsider its verdict in a criminal case on remand would have to reassess all of the evidence admitted at trial . . . , on a cold record, to determine — possibly years after the fact — whether it again [is] persuaded beyond a reasonable doubt that the defendant was guilty of the crime charged[.][7]

This task is a difficult one — particularly in a case like this one, where the nature of the error would require reconsideration of all the evidence, including a reassessment of Nelson's credibility, in light of a presumption that more strongly supports her testimony. That the State now disagrees with how we exercised our discretion is not a valid basis upon which to grant its petition for rehearing.[8]

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[6] (...continued)
pervasive that a new trial will be required); *see also City of Seattle v. Erickson*, 398 P.3d 1124, 1131 (Wash. 2017) (remanding for new trial in light of faulty *Batson* analysis after concluding that "[i]t would be unreasonable to require the trial court to recall and evaluate the prosecutor's demeanor and credibility after [a significant] passage of time").

[7] *State v. McDougal*, 449 P.3d 919, 923 (Or. App. 2019).

[8] *See* Alaska R. App. P. 506(a) ("A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court.").

For these reasons, the State's petition for rehearing is **DENIED**.

Entered at the direction of the Court.

Clerk of the Appellate Courts

/s/ M. Montgomery

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Meredith Montgomery

cc: Court of Appeals Judges
Trial Court Clerk - Anchorage
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